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No. .....

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In the Supreme Court of the United States

OCTOBER TERM, 1982

D. L. JONES,
Petitioner,

vs.

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

GENE STIPE
Counsel of Record

MITCHELL A. LEE

Stipe, Gossett, Stipe, Harper & Estes
2915 North Lincoln
P. O. Box 53567
Oklahoma City, Oklahoma 73152
(405) 524-2268

Attorneys for Petitioner

November, 1982

QUESTIONS PRESENTED

1. In a capital case where the crime has as its *mens rea* element a specific intent or special mental element, can the appellate court circumvent the requirements of the Fourteenth Amendment by failure to properly instruct the jury on mitigating defense which would allow the jury to find the accused guilty of a lesser included crime?

2. Whether the manner in which the M'Naghten Rule of Legal Sanity was applied correctly, and in such a manner as to not deprive the petitioner due process of law?

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D. L. JONES,
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VS.

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

The Petitioner, D. L. Jones, requests that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals entered in this case on July 26, 1982.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals was published and appears at 648 P.2d 1251 (Okl.Cr. 1982), and appears in Appendix A of this Petition. No opinions were rendered by the trial court.

JURISDICTION

The petitioner is seeking a Writ of Certiorari to the Oklahoma Court of Criminal Appeals in order to review a judgment entered on July 26, 1982. A timely Petition for Rehearing was denied by the Court of Criminal Ap-

peals on September 10, 1982. Jurisdiction is invoked under 28 U.S.C. Section 1257(3), petitioner having asserted below and asserting herein, deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. The United States Constitution, Amendment XIV, Section 1, provides, in pertinent portion:

> ". . . Nor shall any state deprive any person of life, liberty or property, without due process of law . . ."

2. 21 O.S. Section 701.7 (1976), provides in pertinent portion:

> *Murder in the First Degree.* "(A) A person commits murder in the first degree when he unlawfully and with malice forethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

3. 21 O.S. Section 711 provides, in pertinent portion:

> *Manslaughter in the first degree defined.* "Homicide is manslaughter in the first degree in the following cases:
>
> * * *
>
> 2. When perpetrated without a design to effect death and in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under circumstances as to constitute excusable or justifiable homicide."

STATEMENT OF THE CASE

A. Procedural Background of the Case

Petitioner was charged in an Oklahoma State Trial Court with the crime of murder in the first degree in connection with the homicide of a bar patron.

At the conclusion of the trial, the trial judge instructed the jury on both the crimes of murder in the first degree, and manslaughter in the first degree. The court also instructed the jury on the defense of insanity and intoxication. During the sentencing proceeding, the jurors sentenced the petitioner to death.

On appeal to the Oklahoma Court of Criminal Appeals, the petitioner, among other arguments, urged that the trial court's application of the M'Naghten Rule denied the petitioner due process due to the restrictive application of the M'Naghten Rule. The Oklahoma Court of Criminal Appeals affirmed the petitioner's conviction of first degree murder, and also affirmed the death penalty. A copy of the Oklahoma Court of Criminal Appeals' Order is attached hereto as Appendix A.

The petitioner herein timely petitioned the Court of Criminal Appeals for a rehearing in his case basing such rehearing on a failure to give a proper instruction on voluntary intoxication. A copy of petitioner's Petition for Rehearing in the Oklahoma Court of Criminal Appeals is attached hereto as Appendix B. The Oklahoma Court of Criminal Appeals denied the petitioner's Petition for Rehearing with a copy of said denial attached hereto as Appendix C.

B. Relevant Facts Underlining the Petitioner's Conviction

On March 14, 1979, the petitioner was drinking at the Wichita Lounge in Lawton, Oklahoma. While Petitioner was sitting at the bar, a waitress noticed a gun in the petitioner's boot. The waitress asked the petitioner to cover the pistol with his pants leg, and thereafter, for no apparent reason, pulled the pistol from his boot and shot a woman who had accompanied him to the bar. After shooting the woman the petitioner turned to two parties in the bar, shooting both of them and killing one. As a result, the petitioner was charged with first degree murder.

In defense of his acts, the petitioner raised the defense of temporary insanity. The petitioner raised a defense of unconsciousness. The petitioner's insanity defense, and his unconsciousness defense, were based upon the fact that the petitioner was, at the time of the shooting, taking the prescribed medicine Ativan. On the day of the shooting, the petitioner had voluntarily ingested both the Ativan, and alcoholic beverages. The petitioner presented, in support of his defense, the testimony of two psychiatrists, Dr. Charles Beck and Dr. Lawrence Wharton, who specialize in alcohol and drug addiction problems. The State thereafter presented medical witnesses in rebuttal.

At the close of the trial, the trial court gave an instruction whereby manslaughter was set forth as a lesser included offense to the crime of murder. As is set forth in greater detail hereinafter, that instruction did not mention that the petitioner's state of voluntary intoxication could allow for a manslaughter conviction. The trial court

also gave an instruction whereby the jury was instructed that should the jury find that the petitioner was in such a state of voluntary intoxication as to render his mind incapable of forming or entertaining a specific intent, that the petitioner should be found not guilty of the offense. Once again, this instruction made no mention that the petitioner's state of intoxication could have reduced the crime of murder to the crime of manslaughter.

On appeal, the Oklahoma Court of Criminal Appeals determined that petitioner's conduct fell clearly within the realm of voluntary intoxication, therefore precluding the petitioner's use of the defenses of insanity and unconsciousness as a complete defense. Nonetheless, the Court of Criminal Appeals did note that intoxication could reduce the crime from murder in the first degree to manslaughter in the first degree, provided the intoxication rendered the petitioner incapable of forming a deliberate intent to effect death. The Court of Criminal Appeals also determined that the applicability of the M'Naghten Rule to the petitioner's case was constitutional, and did not violate the petitioner's due process. Without opinion, the Court of Criminal Appeals brushed aside the petitioner's argument in this Petition for Rehearing that the jury was not properly instructed as to the state of voluntary intoxication as a mitigating circumstance sufficient to allow the sentencer to have found the petitioner guilty of the lesser included offense of manslaughter.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. On appeal to the Oklahoma Court of Criminal Appeals the petitioner claimed that he was denied due process of law through the unduly restrictive application of the M'Naghten Rule.

2. In the petitioner's Petition for Rehearing in the Court of Criminal Appeals, the petitioner supplemented his argument by claiming that the failure of the trial court to give a proper instruction on voluntary intoxication precluded the jury from considering the intoxication as a mitigating circumstance. While this argument was not couched in terms of this Court's prior holding in *Locket* v. *Ohio* and *Eddings* v. *Oklahoma*, the petitioner clearly raised the failure of the jury to be properly instructed on mitigating circumstances.

REASON FOR GRANTING THE WRIT

In upholding the conviction of the petitioner, the Oklahoma Court of Criminal Appeals disposed of a federal constitutional question in a way which fundamentally misconstrues previous decisions of this Court. The question involves the failure of the trial court to properly instruct the jury on voluntary intoxication as a mitigating circumstance surrounding the offense, thus precluding the sentencer from finding the petitioner guilty of a lesser included offense due to a restrictive application of the M'Naghten Rule.

I. THE OKLAHOMA COURT OF CRIMINAL APPEALS' DECISION UPHOLDING A CRIMINAL CONVICTION WHERE THE SENTENCER WAS NOT ADEQUATELY INSTRUCTED AS TO THE MITIGATING CIRCUMSTANCES SURROUNDING THE OFFENSE VIOLATES THE PETITIONER'S DUE PROCESS AND IS IN CONFLICT WITH THIS COURT'S DECISIONS DUE TO AN UNCONSTITUTIONALLY RESTRICTIVE APPLICATION OF THE M'NAGHTEN RULE.

The trial court in this case told the jury in its instruction as regarded manslaughter as follows:

> "You are further instructed that under the facts of this case the crime of murder, is heretofore defined in these instructions embraces a lesser degree of felonious homicide known as first degree manslaughter. In such cases the statute of this state defines homicide as manslaughter in the first degree when perpetrated without a design to effect death, and in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstance as constitutes excusable or justifiable homicide. This category of homicide is also known under the laws as voluntary manslaughter and otherwise defined as the unlawful and intentional killing of another under the influence of a sudden heat of passion caused by adequate provocation, and without malice."

The trial court further instructed, as regards voluntary intoxication:

> "You are instructed that no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition; however, if you find and believe that the defendant was in such a state of intoxication

as to render his mind incapable of forming or entertaining this specific intent essential to the offense, he should be found not guilty of said offense."

The petitioner's insanity defense was based upon a cross-reaction between the drug, Ativan, and the alcohol which he had consumed on the day of the events in question. The Oklahoma Court of Criminal Appeals determined, however, that the petitioner's conduct fell within the realm of voluntary intoxication, and that voluntary intoxication, resulting in temporary mania, does not constitute a mental defect or disease required for a valid insanity defense.

The Court of Criminal Appeals therefore decided that the application of the M'Naghten test of criminal responsibility was constitutional insofar as it was applied to petitioner's case as petitioner was allowed to present evidence as to whether he knew the difference between right and wrong at the time of the commission of the acts for which he was charged. In support of the constitutionality of the application of M'Naghten to petitioner's case, the Oklahoma Court of Criminal Appeals cited this Court's decision in *Leland* v. *Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952). The petitioner would submit, however, that even assuming arguendo that the M'Naghten Rule remains constitutional, the unduly restrictive application of the M'Naghten Rule to petitioner's case was wholly in violation of his due process rights. Under M'Naghten the standard is whether or not the accused is able to determine right from wrong at the time of the acts of which he is charged. Nonetheless, in the State of Oklahoma it is entirely possible for an accused to be convicted of the crime of murder

in the first degree even though the accused may not have been able to differentiate between right and wrong at the time of the commission of the offenses. As the Oklahoma Court of Criminal Appeals noted in affirming petitioner's conviction:

> "The settled rule in this jurisdiction is that while voluntary intoxication is not a complete defense to criminal culpability, it may be considered in determining whether the accused possessed the requisite criminal intent during the commission of the crime."

In *Miller* v. *State*, 567 P.2d 105 (Okl.Cr. 1977), we stated:

> "Intoxication would not excuse or mitigate crime unless accused had been so intoxicated that his mental powers had been overcome and it had therefore been impossible for him to form criminal intent. This question of intoxication to the point where the accused is unable to form the requisite intent is a question for the jury on proper instructions from the bench."

In petitioner's case, however, proper instructions were not given as regarded the petitioner's intoxicated condition at the time of the offense charged. As hereinabove mentioned, the trial court gave an instruction on first degree manslaughter. That instruction did not include any reference to voluntary intoxication. The trial court also gave an instruction on voluntary intoxication, but that instruction directed that the jury should find the petitioner herein not guilty of the crime for which he was charged if the jury determined, in fact, that the petitioner was so intoxicated at the time of the acts to be incapable of forming or entertaining the specific intent essential to the offense charged.

The petitioner would submit to this Court that failure to give proper instruction on voluntary intoxication denied the petitioner due process of law in that the jury was never able to properly consider intoxication as a mitigating circumstance. In his Petition for Rehearing filed with the Oklahoma Court of Criminal Appeals, the petitioner herein asserted that the trial court had failed to give a proper instruction on voluntary intoxication and its effect upon the potential for the petitioner to be convicted of the lesser included offense of manslaughter. The petitioner cited to the court the cases of *Beshirs* v. *State*, 14 Okl.Cr. 578, 174 P. 577 (1918) and *Biggerstaff* v. *State*, 491 P.2d 345 (Okl. Cr. 1971) and *Gibson* v. *State*, 51 P.2d 891 (Okl.Cr. 1972). As stated in those cases, the Oklahoma Court of Criminal Appeals has held that the proper instruction to give, when there is evidence of intoxication, is as follows:

> "You are instructed that homicide committed with a design to effect death is not the less murder because the perpetrator was in a state of voluntary intoxication at the time. However, one of the elements of the crime of murder is an intent to effect the death of the person killed and if you find that the defendant at the time of the killing was so completely drunk (intoxicated) as to be totally unable to form an intent to kill, or if you have a reasonable doubt thereof, you should not find the defendant guilty of murder. The homicide, under such circumstances, unless otherwise excusable, would amount to manslaughter in the first degree."

The petitioner would also submit that the failure of the Oklahoma Court of Criminal Appeals, and the trial court, to give such an instruction, contravenes the decision by this Court in *Tucker* v. *United States*, 151 U.S. 164, 14

S.Ct. 299, 38 L.Ed. 1193 (1894). In *Tucker*, the plaintiff-in-error came to this Court claiming error due to the failure of the trial court to give an instruction stating that if the defendant, at the time of the killing, was so drunk as to render the formation of any specific intent to take her life impossible on his part, and before becoming drunk he entertained no malice toward her and no intention to take her life, he could not be convicted of murder. This Court found that the instruction complained of was not erroneous, as the trial court instructed the jury that if the defendant, at the time of the killing, although not insane, was in such a condition of mind, by reason of drunkenness, as to be incapable of forming a specific intent to kill, or do the act that he did do, the grade of his crime would be reduced to manslaughter. This Court determined that the instruction given by the trial court was every bit as favorable to the defendant as that which the defendant requested.

The jury in the case of the petitioner herein was not given such an instruction. As such, the instructions given by the trial court circumvent this Court's holding in *Tucker*.

II. THE FAILURE OF THE TRIAL COURT TO GIVE A PROPER INSTRUCTION ON VOLUNTARY INTOXICATION PRECLUDED THE JURY FROM PROPERLY CONSIDERING INTOXICATION AS A MITIGATING CIRCUMSTANCE, AND CIRCUMVENTS THIS COURT'S PRIOR HOLDINGS.

As hereinbefore discussed, the petitioner's defense to the crime of which he was charged was based upon insanity. The petitioner claimed that the insanity was brought on by a cross-reaction between prescription medication and alcohol which the petitioner had ingested on the day of the acts charged. By failing to properly instruct the jury on voluntary intoxication, however, the jury was improperly precluded from considering the petitioner's intoxication as a mitigating circumstance. Further, that this failure to properly instruct the jury on the mitigating circumstance of intoxication led to the unduly restrictive and unconstitutional application of the M'Naghten Rule in petitioner's case.

While the precise issue of the constitutionality of the M'Naghten Rule's application to petitioner's case, in light of the instructions given on manslaughter and voluntary intoxication, was not clearly couched in terms of a violation of this Court's prior holdings in *Locket* v. *Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); and *Eddings* v. *Oklahoma*, ... U.S. ....., 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the issue was brought before the Oklahoma Court of Criminal Appeals in the petitioner's Petition for Rehearing. The Oklahoma Court of Criminal Appeals denied the Petition for Rehearing without opinion. As this Court is well aware, the holding in *Locket and Eddings* mandate

that the circumstances surrounding both the offense and the character and propensities of the offender, are elements to be presented to the sentencer in order that they might consider all of the mitigating circumstances surrounding the offense. In petitioner's case, had the jury been properly instructed that voluntary intoxication could have reduced the petitioner's crime from murder in the first degree to manslaughter in the first degree, it is certainly possible that the jury would not have returned the murder conviction and sentence of death.

The situation presented by the case of the petitioner herein is analogous to *Eddings* in that the voluntary intoxication instruction only allowed the jury to find the defendant either guilty, or not guilty, of the crime of murder. The Oklahoma Court of Criminal Appeals clearly did not consider the issue of voluntary intoxication as a mitigating circumstance in that it applied the pure M'Naghten test to determine whether or not the petitioner herein knew the difference between right and wrong. Thus, the Court of Criminal Appeals and the trial court used an unduly restrictive application of the M'Naghten test, absent a proper voluntary intoxication instruction, which denied the petitioner his due process rights to have the voluntary intoxication considered by the jury as a mitigating circumstance and thus affording the jury the opportunity to convict the petitioner of first degree manslaughter. As the Oklahoma Court of Criminal Appeals has sanctioned the trial court's failure to give a proper instruction on voluntary intoxication, in order that the jury might have considered it as a mitigating circumstance, a Writ of Certiorari should be issued to review the Court of Criminal Appeals judgment.

CONCLUSION

For the failure of the trial court to give a proper instruction on voluntary intoxication and thereby applying an unduly restrictive and unconstitutionally restrictive test under the M'Naghten Rule, the petitioner requests a Writ of Certiorari be granted.

Respectfully submitted,

GENE STIPE
Counsel of Record

MITCHELL A. LEE

Stipe, Gossett, Stipe, Harper & Estes
2915 North Lincoln
P. O. Box 53567
Oklahoma City, Oklahoma 73152
(405) 524-2268

Attorneys for Petitioner

November, 1982

APPENDIX A

FOR PUBLICATION

[Filed July 26, 1982]

IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

D. L. JONES,	)	
Appellant,	)	
-vs-	)	
	)	No. F-80-509
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

OPINION

CORNISH, Judge:

The appellant, D. L. Jones, was convicted of Murder in the First Degree and received the death penalty. He was also found guilty on two counts of Assault and Battery with a Deadly Weapon and was sentenced to twenty years' imprisonment, and twelve years' imprisonment, respectively.

In the guilt phase of the trial proceedings the appellant raises two interrelated propositions of error. Jones argues that his defense of insanity and his defense of unconsciousness, as a matter of law, require acquittal. He also contends that the application of the M'Naghten rule for insanity violates the due process clause of the United States and Oklahoma Constitutions.

On March 14, 1979, Jones was dinking at the Wichita Lounge in Lawton, Oklahoma. While he was seated at the bar, the barmaid noticed a pistol protruding from his boot. She asked Jones to cover the pistol with his pant leg. Jones told her to shut her mouth or he would blow her head off. Seconds later, the appellant, for no apparent reason, pulled the pistol from his boot and shot a woman who had accompanied him to the bar. After shooting his female companion, Jones turned around to Stanley Buck, Sr. and

his son, Stanley Buck, Jr., and asked them, "What the hell are you doing in here?" Jones proceeded to shoot Stanley Buck, Jr. He then turned to Stanley Buck, Sr. and shot him twice in the head at point blank range.

Realizing that Stanley Buck, Jr. was still alive, Jones vowed, "Now I'm going to get you." He further stated, "If I let you live, you'll tell the cops, won't you?" At this point Jones shot Stanley Buck, Jr., again. As one lay dead and two others critically wounded, Jones proclaimed, "I've killed every son-of-a-bitch in here, I guess I'll get me a beer."

The appellant's shooting spree resulted in the death of Stanley Buck, Sr. Jones' female companion was critically injured, requiring the removal of her spleen. Stanley Buck, Jr., spent three weeks in intensive care and is paralyzed on his left side. He was also given a tracheotomy to save his life.

Jones testified that on the day of the murder he had probably taken a prescribed drug, Ativan, in combination with alcohol. He attempted to prove that the interaction between the medication and the alcohol rendered him unconscious of his acts. Jones concludes that the trial court should have directed a verdict on a lesser charge or directed an acquittal, since he introduced evidence of being unconscious at the time of the crime.

DEFENSE OF INSANITY

The appellant's apparent reliance upon an insanity defense is misplaced. Jones in essence argues that the voluntary ingestion of drugs and alcohol, resulting in temporary insanity, standing alone, should provide a complete defense and thus negate criminal responsibility. Oklahoma follows the M'Naghten test of legal insanity. 21 O.S. 1981, §152; *Garrett* v. *State*, 586 P.2d 754 (Okl.Cr. 1978). The defendant must demonstrate at trial that during the commission of the crime he was suffering from a mental disease or de-

fect rendering him unable to differentiate between right and wrong, or unable to understand the nature and consequences of his acts.

It has long been the rule in this jurisdiction that voluntary intoxication, resulting in temporary mania, does not constitute a mental defect or disease required for a valid insanity defense. *Cheadle* v. *State*, 11 Okl.Cr. 566, 149 P. 919 (1915). To constitute legal insanity, caused by intoxication, the mental disease must result from chronic alcoholism; not merely a temporary mental condition. *Cheadle*, supra; *See also*, *Mott* v. *State*, 94 Okl.Cr. 145, 232 P.2d 166 (1951). Insanity, induced through long periods of excessive alcohol or drug consumption resulting in a continuing mental disease or defect may render a person irresponsible for his conduct, if he is deprived of the mental capacity to distinguish between right and wrong. *Myers* v. *State*, 83 Okl.Cr. 177, 174 P.2d 395 (1946).

Title 21, Section 153 of the Oklahoma Statutes provides that "[n]o act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition." 21 O.S. 1981, §153. This principle is premised upon the public policy that one who voluntarily consumes alcohol or narcotics should not be relieved from all criminal responsibility merely because the chemical impaired his mental capacity. The voluntary use of intoxicants has been found to be a significant factor in the increase in crime, resulting in an increased danger to the safety and welfare of our citizens.[1]

In *Couch* v. *State*, 375 P.2d 978 (Okl.Cr. 1962), this Court applied the law of voluntary intoxication where nar-

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[1] See Dr. Samuel B. Guze, et al. "Psychiatric Disorders and Criminality," *Journal of the American Medical Association*, Vol. 227, No. 6, p.641 Feb. 1974). This article concluded that sociopathy, alcoholism, and drug dependence are the principle psychiatric disorders associated with serious crime.

cotics are used as the intoxicating medium. In *Couch*, this Court held that where drugs are voluntarily taken, the law of voluntary intoxication shall apply. The *Couch* Court quoted *People* v. *Lim Dum Dong*, 26 Cal.App.2d 135, 78 P.2d 1026, 1028 (1938), which articulated the public policy considerations underlying the limited intoxication defense. The California Appeals Court stated:

> There is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellow men, and to society, to say nothing of more solemn obligations, to preserve, so far as lies in his power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable, but if, by a voluntary act, he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which, in that state, he may do to others or to society," * * * "It must be 'settled insanity', and not merely a temporary mental condition * * *"' which will relieve one of the responsibility of his criminal act.

See also *Gibson* v. *State*, 501 P.2d 891 (Okl.Cr. 1972); *Myers* v. *State*, 83 Okl.Cr. 177, 174 P.2d 395 (1948). In this case, Jones voluntarily mixed alcohol with prescribed medication. This places his conduct within the area of voluntary intoxication.

Therefore, in the area of voluntary intoxication we find that our statutes are controlling. The Oklahoma legislature has determined that voluntary intoxication should not completely relieve one of criminal responsibility. Any change in this public policy statement must come from that branch of government and not from the judiciary.

The settled rule in this jurisdiction is that while voluntary intoxication is not a complete defense to criminal

culpability, it may be considered in determining whether the accused possessed the requisite criminal intent during the commission of the crime. In *Miller* v. *State*, 567 P.2d 105 (Okl.Cr. 1977), we stated:

> "[i]ntoxication would not excuse or mitigate crime unless accused had been so intoxicated that his mental powers had been overcome and it had therefore been impossible for him to form criminal intent. This question of intoxication to the point where the accused is unable to form the requisite intent is a question for the jury on proper instructions from the bench."

See also *Johnson* v. *State*, 621 P.2d 1162 (Okl.Cr. 1980); *Biggerstaff* v. *State*, 491 P.2d 345 (Okl.Cr. 1971); *Copperfield* v. *State*, 37 Okl.Cr. 11, 255 P. 590 (1927); *Beshirs* v. *State*, 14 Okl.Cr. 578, 174 P. 577 (1918).

Stated simply, voluntary intoxication is no defense to a crime, except to the extent that the intoxication rendered the defendant incapable of forming the necessary mental element. To constitute insanity, caused by intoxication, whether alcohol or drug induced, it must be caused from prolonged use of the intoxicant resulting in a fixed state of mental disease or defect; not merely a temporary mental condition existing during commission of the crime. The determination as to whether the prolonged use of the intoxicant has caused a fixed mental disorder is a question of fact for the jury.

A review of the trial transcript reveals that the appellant did not introduce sufficient evidence to raise a reasonable doubt as to whether he was suffering from a mental disorder due to prolonged alcohol or drug use. In support of his insanity defense he called two spychiatrists, Dr. Charles Beck, and Dr. Lawrence Wharton, who specializes in alcohol and drug addiction problems.

Dr. Beck testified that he had examined the appellant for two hours on October 8, 1978. Dr. Beck conducted sev-

eral psychological tests with Jones. The Minnesota Multiphasic Personality Inventory disclosed Jones to be dissatisfied, depressed, discouraged, withdrawn, and worried. This test also suggested he experienced some anxiety, obsessive and compulsive traits. Dr. Beck also administered the Cognitive Capacity Screening test which evaluates whether any brain damage or toxicity is present. Jones scored twenty-eight out of thirty, clearly indicating a lack of organic brain syndrome.

Dr. Beck diagnosed Jones as a borderline schizophrenic. He stated that the interrelationship between the medication, Ativan, and the alcohol could have produced a psychosis causing Jones not to understand the wrongfulness of his conduct. Dr. Beck concluded that due to the alcohol and drugs there was a "reasonable medical inference" that Jones did not know right from wrong at the time of the homicide. On cross-examination Dr. Beck candidly admitted that although combinations of alcohol and drugs have been known to induce a schizophrenic state, in this particular case it may or may not have produced such a mental state.

Dr. Wharton described his impressive background in the field of alcohol and drug abuse. He testified that the combination of alcohol and Ativan (Lorazapam) would cause a sedative effect. He further stated that the combination can cause a psychotic reaction. However, he explained this psychotic reaction is "totally unpredictable . . . in any given individual." Dr. Wharton testified he had never personally examined Jones nor had he ever met him.

Dr. Wharton explained that any person who uses sedative drugs with alcohol is subject to blackout spells. Whether any one person will experience blackouts depends upon the amount of rest he has had, how long since he has eaten, his physical characteristics, his metabolism and various other factors. He stated that these blackouts are the result of toxic organic brain syndrome induced by

drugs. Further, a person experiencing such a blackout would be unable to differentiate between right and wrong.

Jones testified on his own behalf. He related that he had experienced mental health problems early in life. At age fourteen he was attacked by a homosexual. In 1973, at age thirty-three, he consulted a social worker about his mental problems. In 1975 he underwent a successful prosthesis operation to remedy his impotency problem. In 1978 Jones went to his family doctor because he had been experiencing headaches. His doctor prescribed Ativan, which alleviated the headaches. Jones stated that he did not remember anything about the events which took place in the Wichita Lounge.

On cross-examination Jones testified that he had been drinking heavily since he was twenty-one. However, he further testified that by August 1979 his drinking problem was under control. On the afternoon in question Jones had consumed two drinks of whiskey and at least one beer. He stated that he was not even sure whether he had taken Ativan on the day of the shooting, however, he probably did. Jones related that he had consumed alcohol and Ativan on several prior occasions and admitted to having voluntarily taken the alcohol and Ativan on August 14, 1979.

To the extent the appellant produced evidence that he was suffering from a fixed mental disorder, irrespective of the consumption of alcohol and drugs, the trial court properly instructed the jury on the defense of legal insanity. However, this Court finds that the State introduced sufficient evidence in rebuttal to support the jury's finding that Jones was capable of distinguishing between right and wrong during the commission of the crime.

On rebuttal, the State introduced testimony of four expert witnesses. First, Esther Blevin, a psychologist, testified that she administered a full battery of psychological tests to Jones in August, 1979. Ms. Blevins is employed

with the alcohol and drug abuse program at Western State Hospital. She stated that her test results conformed with Dr. Beck's showing Jones to be obsessive, insecure, compulsive, anxious and a ruminating individual. Blevins concluded however, based upon the appellant's conduct, both physical and verbal, as described by the witnesses and the victims present at the crime scene, it was her opinion that he was aware of what he was doing during the crime. However, she declined to give an opinion as to whether the appellant knew the consequences of his acts in the Wichita Lounge.

Dr. Sambojon, a psychiatrist, examined the appellant for possible mental disorders. Dr. Sambojon testified that it was extremely difficult to psychologically examine Jones because he refused to answer most of his questions. His diagnosis revealed that Jones showed no symptoms of schizophrenia.

Also, on rebuttal, Dr. Scroggin, a doctor of internal medicine, testified that over a three-year period he treated many persons suffering from chronic effects of alcohol which produced organic brain disease. He stated that from his experience a person generally will not "blackout" from the use of Ativan and alcohol unless there is an excessive use of alcohol.

Dr. Scroggins stated that even if Jones did blackout, it was very unlikely that such a blackout would continue for six hours, as the appellant testified. He further concluded that two drinks of whiskey and one glass of beer combined with Ativan would not likely cause someone to blackout.

Lastly, Dr. Orr, a neurologist, testified about the effects alcohol and drugs have on the nervous system. She related that Ativan (Lorazepam) initially and primarily acts upon the ascending reticular activating system of the brain, which keeps us awake. Dr. Orr further stated that our memory is located in another part of the brain called

the limbic system. She concluded that if Jones combined alcohol and Ativan, he would have acted sleepy and his speech would have been slurred. She concluded that merely three alcoholic drinks combined with Ativan would probably not affect his memory, refuting Jones' testimony that he could not remember anything that happened during the six-hour time period.

During the State's case in chief, testimony of fourteen lay persons was introduced. These witnesses primarily testified as to Jones' behavior on the day of the homicide, and his conduct and statements subsequent to the shootings. This testimony revealed that the appellant's statements were coherent and he appeared to have full control over his actions. The testimony tended to establish that during the entire episode, he remained calm and mentally capable of understanding the nature of his acts and was aware of their wrongfulness.

Further, the appellant admitted driving home without any mishap, minutes after the shooting. The witnesses also testified that Jones did not appear to be under the influence of alcohol or drugs during the commission of the crime. Evidence was also introduced as to specific statements made by Jones which tended to show he was cognizant of his conduct. Jones made the following statements:

1. "Shut your mouth or I'll blow your head off."
2. "If I let you live, you'll tell the cops, won't you?"
3. "I come down here to kill every son-of-a-bitch in here."
4. "I've killed every son-of-a-bitch in here, I guess I'll get me a beer."

We are of the opinion that the State presented sufficient evidence to rebut the appellant's insanity defense. It is the function of the jury to determine the weight and

credibility of both lay and expert witnesses in light of the particular events surrounding the criminal episode. The jury's determination on the sanity issue will not be disturbed on appeal where there is sufficient evidence to support its finding. Reviewing the record, we find as a matter of law the evidence was sufficient for the jury to conclude Jones was sane during the commission of the offense. See *West* v. *State*, 617 P.2d 1362 (Okl.Cr. 1980).

DEFENSE OF UNCONSCIOUSNESS

The appellant also asserts that, as a matter of law, he established the defense of unconsciousness (automatism). Again, we note that the voluntary consumption of alcohol and drugs is only admissible to show an absence of a premeditated design to kill. Therefore, intoxication can reduce the homicide from murder in the first degree to manslaughter in the first degree, provided the intoxication rendered Jones incapable of forming a deliberate intent to effect death. *Myers* v. *State*, supra; see also *Oxendine* v. *State*, 335 P.2d 940 (Okl.Cr. 1958). It follows that where the defendant's unconsciousness results from the voluntary consumption of alcohol or drugs the defense of unconsciousness (automatism) as a complete defense is not available.

The defense of unconsciousness applies to situations where the defendant's otherwise criminal conduct results from an involuntary act totally beyond the control and knowledge of the defendant. The defense is not the same as insanity. *Carter* v. *State*, 376 P.2d 351 (Okl.Cr. 1962). To invoke an unconsciousness defense the defendant is not required to present evidence of a mental disease or defect.

In this case, even if Jones was rendered into a state of unconsciousness during the crime, the evidence is clear that the mental state was induced through the voluntary consumption of alcohol and drugs. Thus, Jones' mental state was not totally beyond his mental or physical control. Furthermore, Jones testified that he was informed at

Alcoholics Anonymous meetings about the dangers of taking sedative drugs. Consequently, he was knowledgeable of the risks involved with combining alcohol and drugs. We hold that Jones did not present sufficient evidence to create a reasonable doubt that he was unconscious, during the homicide, due to circumstances wholly beyond his knowledge and control.

DEFENSE OF INVOLUNTARY INTOXICATION

Involuntary intoxication is a complete defense where the defendant is so intoxicated that he is unable to distinguish between right and wrong, the same standard as applied in an insanity defense. An involuntary intoxication defense is available where the intoxication results from: 1) fraud, trickery or duress of another; 2) accident or mistake on his own part; 3) a pathological condition; 4) ignorance as to the effects of prescribed medication.

The question of whether the defendant's intoxication was involuntary is a fact question for the jury. *Myers* v. *State*, supra at 400. In this case, we find that there was not sufficient evidence to indicate that Jones' intoxication was involuntary. See *Choate* v. *State*, 19 Okl.Cr. 169, 197 P. 1060 (1921).

CONSTITUTIONALITY OF THE M'NAGHTEN RULE

The appellant argues that he was denied due process due to the restrictive application of the M'Naghten rule. In *Richardson* v. *State*, 569 P.2d 1018 (Okl.Cr. 1977), this Court was asked to adopt the Model Penal Code's test for insanity. In *Richardson* we refused to abandon the M'Naghten rule as the exclusive test for insanity in Oklahoma.

We find that the M'Naghten test of criminal responsibility is constitutional. The "choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility." *Leland* v. *Ore-*

gon, 343 U.S. 790, 801, 72 S.Ct. 1002, 1008, 96 L.Ed. 1302 (1952). The state legislature's decision to exculpate only those mentally ill persons who are unable to distinguish between right and wrong is a rational embodiment of a basic tenet of criminal justice that no one should be held criminally responsible for acts which he could not appreciate as wrongful.

In *Leland*, supra, the U.S. Supreme Court in addressing Oregon's use of the M'Naghten rule stated 'its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser . . .' The *Leland* Court further observed that "[t]he science of psychiatry has made tremendous strides since that test was laid down in M'Naghten's Case, but the progress of science has not reached a point where its learning would compel us to require the state to eliminate the right and wrong test. . . ." supra 343 U.S. at 800-801, 72 S.Ct. at 1008. It has been some thirty years since the Supreme Court addressed the issue, however, we find its reasoning to be equally valid today.[2]

---

[2] Our review of the current medical opinions in the field of alcohol and drug use shows that there is still debate as to the medical status and treatment of alcoholism and drug abuse in relation to mental disease. *See* Dr. Jerome Carroll, *"Mental Illness" and "Disease?"; Outmoded Concepts in Alcohol and Drug Rehabilitation*, Community Mental Health Journal, vol. 11(4), p. 418 (1975); Dr. Mogens Ellerman, *Social and Clinical Features of Chronic Alcoholism*, Journal of Nervous and Mental Disease, Vol. 107, p. 556 (1948); Dr. William T. Hart, *Treatment of Alcoholism in a Comprehensive Community Mental Health Center*, American Journal of Psychiatry, Vol. 126, No. 9, p. 109 (1970); Dr. Harris E. Hill, *The Social Deviant and Initial Addiction to Narcotics and Alcohol*, National Institute on Drug Abuse Research Monograph Series, p. 90 (March 1980). Henri Begleiter, *Brain Dysfunction and Alcoholism: Problems and Prospects*, Alcoholism: Clinical and Experimental Research, Vol. 5, No. 2, p. 264 (Spring 1981); Dr. William B. Terhune, *A Method of Treatment of Alcoholism and the Results*, Journal of Kentucky Medical Association (March 1956); E. M. Jellinek, *The Disease Concept of Alcoholism*, 246 (1972).

In determining which test of criminal responsibility best satisfied the ends of criminal justice, this Court will give great deference to the policy determination of the legislature. In an area fraught with scientific and medical uncertainties, we find the legislature's enactment of the M'Naghten rule of legal sanity is consonant with the constitutional guarantee of due process of law.

Having found no reversible errors in the first stage of the proceedings we affirm the jury's decision to find Jones guilty of Murder in the First Degree and two counts of Assault and Battery with a Deadly Weapon.

THE DEATH PENALTY

The appellant concludes that the imposition of the death penalty is excessive as compared to similar cases. It is the duty of this Court to carefully examine the appropriateness of the death penalty. The Oklahoma death penalty statute mandates:

> With regard to the sentence, the court shall determine:
>
> 1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any arbitrary factor;
>
> 2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and
>
> 3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. 21 O.S.Supp.1980, §701-13(c).

In this case, the jury found two statutory aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel; and, (2) the defendant knowingly created a great risk of death to more than one person. We

find that both aggravating circumstances are supported by the evidence.

In *Eddings* v. *State*, 616 P.2d 1159 (Okl.Cr. 1980); ..... U.S. ....., 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (reversed on other grounds), this Court defined the words heinous, atrocious, and cruel. We stated that the legislature intended to reach murders that were "out of the ordinary." We further held that 'heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.' supra at 1167-68. Here, the appellant's cold and brutal shooting of three innocent persons for no apparent reason or motive is in the eyes of this Court extremely wicked and shockingly evil. The evidence also established that the appellant was wholly indifferent to the pain inflicted upon his victims. The unarmed victim lay wounded and pleaded for his life, yet the appellant coldly and deliberately shot him at point blank range and then continued to mock the victim as he bled to death.

The evidence amply supports the jury's finding that Jones knowingly created a great risk of death to more than one person. Not only did he shoot and kill Stanley Buck, Sr., but he shot and seriously wounded two other persons, one of whom was a close friend who had accompanied him to the bar. Both were shot at close range, causing serious injuries. Additionally, Jones made it clear, prior to shooting Stanley Buck, Jr., that he intended to kill him.

In mitigation of the death penalty, the appellant introduced the evidence of his good character. Jones does not have any prior criminal record. He is forty-one years old, married and has four children. Further he was diagnosed as a latent schizophrenic and was under stress at the time of the criminal conduct.

It is the duty of the jury to weigh the aggravating circumstances against the mitigating circumstances in determining whether to impose the death penalty. Here, there is sufficient evidence to sustain the jury's finding that the aggravating circumstances outweighed the mitigating circumstances. Therefore, the crucial issue before this Court is whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases.

When comparing the death sentence with factually similar cases this Court will generally limit our review to those cases decided under the present death penalty statute. In *Eddings* v. *State*, supra, this Court commented:

> An attempt has been made to compare this case with prior cases that were tried and reviewed under death penalty statutes that are definitionally different from the current statutes. Hence, we find those cases provide no basis for meaningful sentence review.

However, this Court presently finds it necessary to cautiously examine earlier first degree murder cases for guidance as to the appropriateness of the appellant's death sentence, where the cases are factually analogous.

In *Gregg* v. *Georgia*, 428 U.S. 153, 205, 96 S.Ct. 2909, 2940, 49 L.Ed.2d 859 (1976), the Supreme Court in footnote 56 commented, "The petitioner further complains about the Georgia Court's current practice of using some *pre-Furman* cases in its comparative examination. This practice was necessary at the inception of the new procedure in the absence of any *post-Furman* capital cases available for comparison." The principle underlying the proportionality review is to substantially guarantee that death penalties will be imposed in a consistent manner. Therefore, we will utilize a very limited comparison of *pre-Furman* cases in an attempt to bring some reasonable consistency in death penalty cases.

In comparing the sentence of death imposed in this case, with cases[3] decided under the current death penalty statutes and other factually similar cases,[4] we hold that the sentence of death is not disproportionate or excessive. We further find that the sentence of death was not imposed under the influence of passion, prejudice or any arbitrary factor.

The sentence of death by lethal drug injection is therefore AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY, OKLAHOMA THE HONORABLE WILLIAM M. ROBERTS, DISTRICT JUDGE

D. L. JONES, appellant, was convicted of Murder in the First Degree in Comanche County District Court Case No. CRF-79-372. The jury imposed the death penalty for the First Degree Murder conviction. Jones was also convicted on two (2) counts of Assault and Battery with a Deadly Weapon in Case No.'s CRF-79-373 and CRF-79-374. The jury set punishment at twenty (20) years and twelve (12) years, respectively. The appellant perfected an appeal to this Court. AFFIRMED.

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[3] *Burrows* v. *State*, 640 P.2d 533 (Okl.Cr. 1982) (modified to life); *Franks* v. *State*, 636 P.2d 361 (Okl.Cr. 1981) (modified to life); *Maghe* v. *State*, 620 P.2d 433 (Okl.Cr. 1980) (life); *Hays* v. *State*, 617 P.2d 223 (Okl.Cr. 1980) (aff'd death penalty); *Irvin* v. *State*, 617 P.2d 533 (Okl.Cr. 1980) (modified to life); *Eddings* v. *State*, 616 P.2d 1159 (Okl.Cr. 1980); ..... U.S. ....., 102 S.Ct. 869, ... L.Ed.2d ..... (1982) (remanded for resentencing); *Chaney* v. *State*, 612 P.2d 269 (Okl.Cr. 1980) (Aff'd death penalty); *Hager* v. *State*, 612 P.2d 1369 (Okl.Cr. 1980) (rev'd on other grunds).

[4] *Washington* v. *State*, 568 P.2d 301 (Okl.Cr. 1977); *Brooks* v. *State*, 566 P.2d 147 (Okl.Cr. 1977); *Patrick* v. *State*, 502 P.2d 1289 (Okl. Cr. 1972); *Gibson* v. *State*, 501 P.2d 891 (Okl.Cr. 1972).

MITCHELL A. LEE
STIPE, GOSSETT, STIPE, HARPER & ESTES
OKLAHOMA CITY, OKLAHOMA

Attorneys for Appellant

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL
ROBERT W. COLE
ASSISTANT ATTORNEY GENERAL
STATE OF OKLAHOMA
OKLAHOMA CITY, OKLAHOMA

Attorneys for Appellee

OPINION BY CORNISH, J.
BRETT, P.J., CONCURS
BUSSEY, J., CONCURS

APPENDIX B

[Filed August 13, 1982]

IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

D. L. JONES,	)	
Appellant,	)	
-vs-	)	
	)	No. F-80-509
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

PETITION FOR REHEARING

COMES NOW D. L. Jones, Jr., hereinafter "Appellant", by and through his attorneys of record, Stipe, Gossett, Stipe, Harper & Estes, and respectfully petition this Honorable Court to grant a rehearing in the above styled matter. In support of this Petition for Rehearing, the Appellant would show this Honorable Court the following:

I

Appellant would respectfully submit to this Court that the opinion heretofore rendered and filed by this Court on July 26, 1982 is in direct conflict with controlling decisions heretofore rendered by this Court which were not called to this Court's attention in Appellant's briefs or oral argument.

Specifically, the Appellant would cite to this Court the cases of *Beshirs* v. *State*, 14 Okl. Cr. 578, 174 P. 577 (1918) and *Biggerstaff* v. *State*, 491 P.2d 345 (Okl. Cr. 1971), and *Gibson* v. *State*, 51 P.2d 891 (Okl. Cr. 1972). While the aforementioned *Beshirs* and *Biggerstaff* cases were, in fact, cited in the opinion of this Court of July 26, 1982, though *Gibson*, was not, Appellant would submit that their application to the case at bar was overlooked or misinterpreted by this Honorable Court.

[APPENDIX]

As stated by the Court in *Beshirs*, and thereinafter cited in *Biggerstaff*,

> "A person who commits a homicide while so drunk as to be incapable of forming a premeditated design to kill, if he had formed no purpose to commit the crime prior to the time he became so intoxicated, is not guilty of murder, but is guilty of manslaughter in the first degree."

This aforementioned instruction was considered by this Court to be the necessary and proper instruction dealing with voluntary intoxication as it related to whether or not a defendant had the requisite intent to commit murder, or was only guilty of manslaughter in the first degree.

In *Biggerstaff*, supra, however the court instructed the jury as follows:

> "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition."

As noted by this Court in its opinion of July 26, 1982, the defense of voluntary intoxication applies to the extent that the intoxication might have rendered the Defendant incapable of forming the necessary mental element of intent.

In *Gibson*, supra, the court instructed as follows:

> "Homicide committed with a design to effect death is not the less murder because the perpetrator was in a state of anger or voluntary intoxication at the time."

In *Gibson*, however, the court did not instruct upon the lesser offense of manslaughter. In *Gibson*, supra, this Court, citing the case of *Oxendine* v. *State*, 335 P.2d 940 (Okl. Cr. 1958), set forth an instruction which was to be used if there was evidence of intoxication. That instruction states:

"You are instructed that homicide committed with a design to effect death is not the less murder because the perpetrator was in a state of voluntary intoxication at the time. However one of the elements of the crime of murder is an intent to effect the death of the person killed and if you find that the defendant at the time of the killing was so completely drunk (intoxicated) as to be totally unable to form an intent to kill, or if you have a reasonable doubt thereof, you should not find the defendant guilty of murder. *The homicide, under such circumstances, unless otherwise excusable, would amount to manslaughter in the first degree.*" (emphasis added)

This instruction apparently was based upon the earlier case of *Choate* v. *State*, 19 Okl. Cr. 169, 197 P. 1060 (1921). The Appellant would submit that the failure of a trial court to include the above emphasized language is reversible error not heretofore noted by this Court in the case at bar.

In *Choate*, *Biggerstaff*, *Gibson* and *Beshirs*, this Court determined that an instruction dealing with voluntary intoxication should not simply state that if the defendant was unable to form the requisite intent that he should be found not guilty of the offense charged without the instruction going farther. Simply stated the instruction must go further, within that same instruction, and direct the jury that it can find the defendant guilty of manslaughter in the first degree. In otherwords, it would not suffice that the instruction allowed the jury to find the defendant not guilty of the crime of murder absent the requisite intent. If, in fact, the jury found the requisite intent to be lacking, the jury should be offered the alternative of finding the defendant guilty of first degree manslaughter pursuant to the same instruction. An analysis of the instructions presented at the trial court in the case at bar clearly shows that the instructions were improper and prejudicial as regards the

issue of intent in relation to voluntary intoxication. The trial court in the case at bar instructed as follows:

Instruction No. 5

"You are further instructed that under the facts of this case the crime of murder, as heretofore defined in these instructions embraces the lesser degree of felonious homicide known as first degree manslaughter. In such cases the statutes of this State define homicide as manslaughter in the first degree when perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitutes excusable or justifiable homicide. This category of homicide is also known under the law as voluntary manslaughter and otherwise defined as the unlawful and intentional killing of another under the influence of a sudden heat of passion caused by adequate provocation, and without malice."

The trial court further instructed:

Instruction No. 12

"You are instructed that no act commiitted by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition; however, if you find and believe that the defendant was in such a state of intoxication as to render his mind incapable of forming or entertaining the specific intent essential to the offense, he should be found not guilty of said offense."

The Appellant would submit, therefore, that Instruction No. 12 clearly under *Biggerstaff*, supra, *Choate*, supra, *Oxendine*, supra, and *Gibson*, supra, fell short of instructing the jury as to the applicable law concerning intoxication. Further, the Appellant would submit, that such an instruction was mandated in order that intoxication could be con-

sidered as a mitigating circumstance. See *Biggerstaff* v. *State*, supra. The Appellant would submit that the case at bar presents precisely the same circumstances which lead this Court to state in *Biggerstaff:*

> "Absent the total consideration of intoxication, the jury had no other tangible reason to consider and was left no alternative but to find the defendant guilty of murder."

While the jury in the case at bar was, in fact, instructed as to manslaughter (see Instruction No. 5 above), such instruction did not relate manslaughter to voluntary intoxication. Under the laws of the State of Oklahoma, as set forth by this Court, the Appellant would submit that the voluntary intoxication instruction fell short, as did the manslaughter instruction, and was prejudicial to the Appellant. As further noted by this Court in *Gibson*, supra,

> ". . . If there is any substantial evidence that the crime charged may have been committed under circumstances which would reduce it from murder to manslaughter, it is the duty of the court to so instruct whether requested by the defendant or not. 'In fact, we have gone so far as to hold in such situations the trial court should give the defendant the benefit of any doubt which the evidence may suggest, and instruct the jury on the law of each degree which the evidence tends to prove, whether requested or not, it is the trial court's duty to do so.' *Tarder* v. *State*, Okl. Cr. 359 P.2d 596, 601."

It is obvious that the jury was not properly instructed as to voluntary intoxication being a mitigating circumstance in regard to the Appellant's ability to form the requisite intent to commit the acts of which he was charged. Further, it is clear under the laws of the State of Oklahoma that the trial court judge was required to properly instruct the jury regardless of whether the instructions given by

the trial court were objected to by the Appellant, or if the Appellant failed to request such an instruction.

Respectfully submitted,

STIPE, GOSSETT, STIPE, HARPER & ESTES
P. O. Box 53567
Oklahoma City, Oklahoma 73152
(405) 524-2268

By: (s) *Mitchell A. Lee*
Mitchell A. Lee

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APPENDIX C

[Filed September 10, 1982]

IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

D. L. JONES,	)	
Appellant,	)	
-vs-	)	
	)	No. F-80-509
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

ORDER DENYING PETITION FOR REHEARING
AND DIRECTING THE ISSUANCE OF MANDATE

On August 13, 1982, a petition for rehearing was filed in the above styled and numbered cause and this Court having carefully considered the same finds that the petition for rehearing should be, and hereby is, DENIED, and the Clerk of this Court is directed to issue the MANDATE FORTHWITH.

DATED this *10th* day of September, 1982.

(s) *Tom Brett*
TOM BRETT, PRESIDING JUDGE

(s) *Hez J. Bussey*
HEZ J. BUSSEY, JUDGE

(s) *Tom R. Cornish*
TOM R. CORNISH, JUDGE

ATTEST:

(s) *Ross N. Lillard, Jr.*
Clerk

Office - Supreme Court, U.S.
FILED
DEC 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-788

In the Supreme Court of the United States

OCTOBER TERM, 1982

D. L. JONES,
Petitioner,

vs.

THE STATE OF OKLAHOMA,
Respondent.

On Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

ROBERT W. COLE
Assistant Attorney General

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Attorneys for Respondent

December, 1982

QUESTIONS PRESENTED

1. Did the Petitioner's failure to object to the instruction on voluntary intoxication, his failure to submit an instruction designed to correct any impropriety or inadequacy in the trial court's instruction, and his failure to raise said issue upon appeal, prior to his petition for rehearing, waive any error in the instruction?

2. Did the instructions, considered as a whole, fairly and accurately state the applicable law so as to apprise the jury of lesser included crimes?

3. Was there a constitutional violation of the due process clause of the Fourteenth Amendment because of the manner in which the M'Naghten Rule of legal sanity was applied?

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No. 82-788

In the
Supreme Court of the United States
OCTOBER TERM, 1982

D. L. JONES,
Petitioner,
vs.
THE STATE OF OKLAHOMA,
Respondent.

On Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, the State of Oklahoma, by and through Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Oklahoma Court of Criminal Appeals entered in this case on July 26, 1982.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals in this case was published and appears at 648 P.2d 1251 (Okl.Cr. 1982) and is appended to the Petition for Writ as Appendix A.

JURISDICTION

The petitioner is seeking a Writ of Certiorari to the Oklahoma Court of Criminal Appeals in order to review a judgment entered on July 26, 1982. A timely Petition for Rehearing was denied by the Oklahoma Court of Criminal Appeals on September 10, 1982. Jurisdiction is invoked under 28 U.S.C. § 1257(3) because the petitioner asserts the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, Amendment XIV, Section 1, provides, in pertinent portion:

> ". . . Nor shall any state deprive any person of life, liberty or property, without due process of law . . ."

2. Title 21 O.S.1981 Section 701.7, provides in pertinent portion:

> *Murder in the First Degree.* "(A) A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifcsted by external circumstances capable of proof."

3. Title 21 O.S.1981 Section 711 provides, in pertinent portion:

> *Manslaughter in the first degree defined.* "Homicide is manslaughter in the first degree in the following cases:
>
> * * *

2. When perpetrated without a design to effect death and in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under circumstances as to constitute excusable or justifiable homicide."

STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND OF THE CASE

D. L. Jones, Jr., subsequently referred to as the petitioner, was tried for the crimes of Murder in the First Degree and two (2) counts of Assault and Battery with a Deadly Weapon in violation of 21 O.S.1981, § 701.7 and 21 O.S.1981, § 652, respectively, in Case Nos. CRF-79-372, CRF-79-373, and CRF-79-374 in the District Court of Comanche County before the Honorable William M. Roberts. The defendant was represented by counsel. The jury returned a verdict of guilty upon the charge of Murder in the First Degree and set punishment at death. The jury also returned verdicts of guilty upon the two (2) counts of Assault and Battery with a Deadly Weapon and set punishment at twenty (20) years and twelve (12) years respectively. The trial court sentenced the defendant in accordance with the verdict.

The Oklahoma Court of Criminal Appeals affirmed all three (3) convictions and also affirmed the sentence of death.

The petitioner timely petitioned the Court of Criminal Appeals for a rehearing based upon a failure of the trial court to give a proper instruction on voluntary intoxication. A copy of petitioner's Petition for Rehearing in the

Oklahoma Court of Criminal Appeals is appended to the Petition as Appendix B. The Oklahoma Court of Criminal Appeals denied the petitioner's Petition for Rehearing, a copy of said denial is appended to the Petition as Appendix C.

B. RELEVANT FACTS UNDERLYING THE PETITIONER'S CONVICTION

On March 14, 1979, the petitioner entered the Saloon Bar and joined a party of three, two of whom were females. The petitioner's wife telephoned the bar in search of the petitioner and spoke with the barmaid who testified that the wife might stop at the bar. Unknown to the petitioner and to avoid a confrontation, one of the females left the bar. When the petitioner realized that his companion had departed he became angry. The petitioner left the Saloon Bar and went across the street to the Wichita Lounge. The barmaid at the Wichita noticed a gun protruding from the petitioner's boot and asked the petitioner to pull his pant leg down so that the gun would be covered. The petitioner responded, "Shut your mouth or I'll blow your head off" (Tr. 402). The petitioner then stated that, "I come down here to kill every son-of-a-bitch in here" (Tr. 428, 498).

The petitioner removed his gun and began to indiscriminately fire it. The petitioner shot the decedent twice and mocked the decedent as he lay bleeding to death. The petitioner then turned to the decedent's son and stated "And now I'm going to get you." The petitioner also stated to him that, "If I let you live, you'll tell the cops, won't you?" As a result of the injuries inflicted by the shoot-

ing, the son spent three (3) weeks in an intensive care unit, his left side became paralyzed and he needs a brace to walk. He also required a tracheotomy.

The petitioner's female companion also was shot. She was able to exit the Wichita Lounge, return to the Saloon Bar, and tell her friends that the petitioner was over at the Wichita shooting everybody. Her spleen had to be removed as a result of the shooting (Tr. 407).

After the shooting spree had ended the petitioner said, "I've killed every son-of-a-bitch in here, I guess I'll get me a beer." The son heard his father moaning, got to his feet, and was able to exit from the Wichita. As the son approached a fruit stand across the street he motioned to call the police because he was unable to talk. The petitioner was seen exiting the Wichita with a gun in his hand. The police and an ambulance were summoned.

A description of the petitioner and his vehicle was given to the police. The description was dispatched to officers on patrol. Two detectives went to the suspect's residence and waited. Five minutes later the petitioner drove up and the officers pulled into the driveway behind the petitioner's vehicle. The petitioner was ordered out of the vehicle, was handcuffed, and was frisked. A revolver was found upon the front seat of his vehicle. The vehicle was impounded and the petitioner was given his rights.

Throughout the sequqence of events the petitioner did not appear to be drunk. Up until the time of his arrest he remained calm, collected, and rational. At all times the petitioner knew what he was doing. The petitioner was identified positively by all the witnesses.

On August 15, 1979 an autopsy was performed upon the decedent. Two (2) bullet wounds were found in his head. The second wound was inflicted at point-blank range. This was ascertained due to the presence of powder burns. The cause of death was the severing of the carotid artery which resulted in asphyxiation because the lungs filled with blood.

The defense called a number of character witnesses to testify. They stated that the petitioner was honest and truthful and that he was a peaceful, non-violent person. The petitioner took the stand on his own behalf. He stated that he was taking prescription medication and that the consumption of alcohol caused him to blackout and lose his memory of the events which had transpired. The petitioner also expressed remorse about the events. Upon cross-examination the petitioner mentioned that the pills and the alcohol were consumed voluntarily. The petitioner then stated that although he has some psychological problems, that he did not consider himself insane and that the alcohol did not affect his ability to distinguish between right and wrong.

The defense called two physicians to testify as expert witnesses. The first physician stated that although he found no organic disorder in the petitioner he opined that at the time of the shooting, the petitioner was in a state of psychosis as a result of the combination of the medication and the alcohol consumed by the petitioner. The physician, however, was unable to state that, beyond a reasonable doubt, the petitioner did not know the difference between right and wrong. In addition, the physician mentioned the fact that because a person is mentally ill does not mean that he does not appreciate the consequences of his act.

The second physician stated that he has detected similar reactions in other patients which he has treated as a result of the ingestion of drugs and alcohol. It was his opinion that the petitioner was not consciously aware of what he was doing as a result of an acute organic brain syndrome and that the petitioner did not have the capacity to discriminate between right and wrong.

The State called four (4) rebuttal expert witnesses. None of the witnesses ever had seen such a blackout reaction as a result of the consumption of alcohol and the medication taken by the petitioner. An expert on internal medicine stated that if such a reaction did occur that the petitioner would have been unable to function normally, as he was able to do on March 14. A neurologist testified that this type of blackout reaction would not occur because sedation would result before one's memory would be affected.

SUMMARY OF ARGUMENT

The petitioner failed to preserve any error in the instruction on voluntary intoxication. Furthermore, the instructions submitted to the jury accurately stated the applicable law and the use of the M'Naghten Rule for legal sanity does not violate the Due Process Clause of the Fourteenth Amendment.

REASONS WHY THE WRIT SHOULD BE DENIED

I. INSTRUCTIONS GIVEN TO THE JURY ARE LEFT TO THE DISCRETION OF THE TRIAL COURT AND THE INSTRUCTIONS, CONSIDERED AS A WHOLE, FAIRLY AND ACCURATELY STATED THE APPLICABLE LAW.

A. The Petitioner neither objected to the instruction on voluntary intoxication nor did he submit any instruction designed to correct any impropriety or inadequacy in the trial court's instruction and raised this issue for the first time in his Petition for Rehearing, therefore any error has been waived.

The purpose of an objection in a trial is to draw the alleged error to the attention of the trial court and to provide that court an opportunity to correct any error at the time of trial. *Myers* v. *State*, 623 P.2d 1035 (Okl.Cr. 1981). The objection must be specific enough to apprise the trial judge of the basis of the claim. *United States* v. *D'Amico*, 408 F.2d 331 (2d Cir. 1969). Otherwise the petitioner will not have preserved a question for appellate review. *United States* v. *Anderson*, 471 F.2d 201 (5th Cir. 1973). A petitioner cannot expect silence in the face of trial error to support the reversal of his conviction upon appeal.

Furthermore, one cannot complain of a failure by the court to charge on an issue without calling the attention of the court to the omission by a prayer for instruction. *Humes* v. *United States*, 170 U.S. 210, 18 S.Ct. 602, 42 L.Ed. 1011 (1898).

> "It has long been the settled rule in Federal courts that an instruction by the court must be excepted to

before the case is submitted to the jury in order to be availed of on appeal. This is no merely technical requirement, but is founded upon reason, justice and expediency. If the error is seasonably called to the court's attention, the court can correct it forthwith and thus, obviate the necessity of a new trial." (Citations omitted)

Frederick v. *United States*, 163 F.2d 536, 549 (9th Cir. 1947), *cert. denied*, 332 U.S. 775, 68 S.Ct. 87, 92 L.Ed. 360 (1947); *see Tucker* v. *State*, 151 U.S. 164, 170, 14 S.Ct. 299, 38 L.Ed. 112 (1894).

Henderson v. *Kibbe*, 431 U.S. 145, 97 S.Ct. 1730, 52 L. Ed.2d 203 (1977), also involved jury instructions and is illuminating, therefore, a rather lengthy excerpt is appropriate:

"An appraisal of the significance of an error in the instructions to the jury requires a comparison of the instructions which were actually given with those that should have been given. Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed to be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.

The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is 'whether the ailing instruction by itself so infected the entire

> trial that the resulting conviction violates due process', *Cupp* v. *Naghten*, 414 U.S., at 147, 94 S.Ct., at 400, 38 L. Ed. 2d 368, not merely whether 'the instruction is undesirable, erroneous, or even "universally condemned",' *id.* at 146, 94 S.Ct., at 400." (Footnotes omitted)

431 U.S. at 154. Mr. Chief Justice Burger, concurring in the judgment, stated that:

> "Thus, by failing to object to the jury charge, respondent injected into the trial process the very type of error which the objection requirement was designed to avoid. Federal courts may not overlook such failure on collateral attack." 431 U.S. at 158.

In the case at bar, while the petitioner did request instructions (O.R. 177-186), an examination of the record will reveal that none of the requested instructions were concerned with voluntary intoxication. Prior to the jury being charged, the following conversation transpired:

> "THE COURT: Okay. Okay, how about the Defense; any problem with one through twenty-four instructions proposed by the Court?
>
> MR. SHACKLER: No, sir, and the Court has already ruled and gave refusals on the one that I submitted." (Tr. 904-905)

The petitioner neither objected to the instruction on voluntary intoxication nor did he submit an instruction designed to correct any impropriety or inadequacy in the trial court's instruction. In addition, this issue was not raised during the appeal but rather was raised for the first time in petitioner's Petition for Rehearing (Brief of Petitioner at 6). Any error has been waived.

B. The instructions given to the jury, considered as a whole, fairly and accuratey stated the applicable law.

Assuming, arguendo, that any defect in the instruction had been preserved, the instructions, when viewed in their entirety, accurately stated the applicable law.

The determination of which instructions shall be given to the jury is a matter within the sound discretion of the trial court, provided that the instructions given fairly and accurately state the applicable law.

> "A trial judge need not give an instruction proposed by counsel for either side, provided he gives adequate instructions on each element of the case.
>
> > 'A party has no vested interest in any particular form of instructions . . . the language of the instructions is for the trial court to determine. If on the entire charges it appears that the jury has been fairly and adequately instructed, the requirements of the law are satisfied.' Moore's Manual of Fed. Practice and Procedure, Vol. 5a, § 22.07(2).
>
> See also *Tucker* v. *United States*, 151 U.S. 164, 170, 14 S.Ct. 299, 38 L. Ed. 112 (1893); *United States* v. *Edwards*, 503 F.2d 838, 841 (9th Cir. 1974); *Amsler* v. *United States*, 381 F.2d 37, 52 (9th Cir. 1967); *Rivers* v. *United States*, 368 F.2d 362, 364 (9th Cir. 1966)."

United States v. *Garcia-Rodriquez*, 558 F.2d 956, 965-966 (9th Cir. 1977), *cert. denied*, 434 U.S. 1050, 98 S.Ct. 900, 54 L.Ed.2d 802.

In determining whether a particular instruction submitted to the jury gives rise to reversible error, the court

is required to view the instruction as part of a totality of of the entire instructions given.

> ". . . [W]e accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."

Cupp v. *Naughten*, 414 U.S. 141, 146-147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973).

In *Hopt* v. *People*, 104 U.S. 631, 633-634, 26 L.Ed. 873 (1881), this Honorable Court recognized the general rule that, at common law, voluntary intoxication afforded no excuse, justification or extenuation of a crime committed under its influence but did state that it becomes "a material subject of consideration by the jury" when deliberate premeditation is an element of the charge. In Oklahoma, voluntary intoxication is no defense to criminal culpability. Title 21 of the Oklahoma Statutes, Section 153 provides:

> "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition."

The Oklahoma Court of Criminal Appeals has concluded that an instruction which merely parrots Section 153 is devoid of total consideration of intoxication and recognized a caveat to this statutory authority in *Phillips* v. *State*, 321 P.2d 724, 727 (Okl.Cr. 1958), wherein it was stated:

> ". . . intoxication would not excuse or mitigate the crime, unless accused was so intoxicated that his mental powers were overcome and it was therefore impossible for him to form a criminal intent."

It is proper practice to employ the language of a statute in an instruction when the statute is composed of clear and simple language. *Lumetta* v. *United States*, 362 F.2d 644 (8th Cir. 1966); *Holloway* v. *State*, 550 P.2d 1352 (Okl. Cr. 1976).

The question of intoxication to the point where the accused is unable to form the requisite intent is a question for the jury. *Miller* v. *State*, 567 P.2d 105 (Okl.Cr. 1977). In *Miller* v. *State*, supra, at 109, the trial court gave the following instruction:

> "NO ACT COMMITTED BY A PERSON WHILE IN A STATE OF VOLUNTARY INTOXICATION SHALL BE DEEMED LESS CRIMINAL BY REASON OF HIS HAVING BEEN IN SUCH CONDITION. 'HOWEVER, IF THE ACCUSED WAS IN SUCH A STATE OF INTOXICATION AS TO RENDER HIS MIND INCAPABLE OF FORMING THE SPECIFIC INTENT ESSENTIAL TO THE OFFENSE, HE SHOULD BE FOUND NOT GUILTY.'"

This instruction is almost identical to the one given in the case at bar:

> "You are instructed that no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition; however, if you find and believe that the defendant was in such a state of intoxication as to render his mind incapable of forming or entertaining this specific intent essential to the offense, he should be found not guilty of said offense."

In *Miller* v. *State*, supra, the Oklahoma Court of Criminal Appeals concluded that the jury had been instructed prop-

erly upon the issue of voluntary intoxication. In the case at bar, the instruction on voluntary intoxication directed the jury to find the petitioner not guilty of the crime for which he was charged (First Degree Murder) if the jury determined that the petitioner was so intoxicated at the time of the acts as to be incapable of forming or entertaining the specific intent essential to the charge of first degree murder. If such a condition of intoxication had been determined to exist, the jury was instructed to consider first degree manslaughter as a lesser included offense.

The jury was instructed and considered voluntary intoxication as a mitigating consideration. The question of intoxication to the point where an accused is unable to form the requisite intent is a question of fact for the jury. The jury concluded that the capacity of the petitioner to appreciate the criminality of his conduct was impaired as a result of intoxication (Trial Court Report at 3, attached hereto as an Appendix). However, the jury determined from the evidence presented that the petitioner's conduct was impaired only slightly as a result of intoxication. The Oklahoma Court of Criminal Appeals also considered the issue and concluded that voluntary intoxication had not been proven.

> "During the State's case in chief, testimony of fourteen lay persons was introduced. These witnesses primarily testified as to Jones' behavior on the day of the homicide, and his conduct and statements subsequent to the shootings. This testimony revealed that the appellant's statements were coherent and he appeared to have full control over his actions. The testimony tended to establish that during the entire episode, he remained calm and mentally capable of understanding

the nature of his acts and was aware of their wrongfulness.

Further, the appellant admitted driving home without any mishap, minutes after the shooting. The witnesses also testified that Jones did not appear to be under the influence of alcohol or drugs during the commission of the crime. Evidence was also introduced as to specific statements made by Jones which tended to show he was cognizant of his conduct. Jones made the following statements:

1. 'Shut your mouth or I'll blow your head off.'

2. 'If I let you live, you'll tell the cops, won't you?'

3. 'I come down here to kill every son-of-a-bitch in here.'

4. 'I've killed every son-of-a-bitch in here, I guess I'll get me a beer.' "

Jones v. *State*, 648 P.2d 1251, 1257 (Okl.Cr. 1982). To state that the Court of Criminal Appeals did not consider the issue of voluntary intoxication (Brief of Petitioner at 13) as a potentially mitigating circumstance is erroneous. It is obvious from the record that the petitioner's mental powers were not overcome by his voluntary intoxication and, therefore, that intoxication will not justify a conviction for a lesser included offense.

This case is unlike *Eddings* v. *Oklahoma*, ... U.S. ....., 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), because in *Eddings* supra, the Oklahoma courts placed limitations upon the mitigating evidence that they would consider. This precluded the jury from hearing evidence as to relevant mitigating factors. In the case at bar, the petitioner was not

precluded from introducing evidence. The petitioner introduced a voluminous amount of evidence as to his mental and emotional background. This was the type of evidence which was not permitted to be introduced in *Eddings*. The petitioner developed his theories of insanity, of unconsciousness, and of intoxication. Merely because the jury concluded that the petitioner's mental powers were not overcome by his intoxication does not mean that the courts did not consider the issue of intoxication as a mitigating circumstance. The jury chose to disbelieve the petitioner's defense and the record reflects that they were justified in doing so. The instructions submitted to the jury were proper and no error has resulted.

II. THE MANNER IN WHICH THE M'NAGHTEN RULE OF LEGAL SANITY WAS APPLIED, WHICH IS THE SOLE TEST USED WITHIN THE STATE OF OKLAHOMA, DID NOT DEPRIVE THE PETITIONER OF DUE PROCESS.

The test of criminal responsibility in Oklahoma is the M'Naghten Rule; it is the sole and exclusive test used. A person who was capable of distinguishing right from wrong at the time an act was committed is to be held responsible for that act. *Matter of M.E.*, 584 P.2d 1340, 1347 (Okl.Cr. 1978), *cert. denied*, 436 U.S. 921, 98 S.Ct. 2271, 56 L.Ed.2d 763 (1978). The Oklahoma Court of Criminal Appeals has been requested to abandon this rule but has declined to do so. "[T]he M'Naghten Rule is the present and exclusive test in this State to determine the question of sanity." *Richardson* v. *State*, 569 P.2d 1018, 1019-1020 (Okl.Cr. 1977). The petitioner contends that ". . . it is entirely possible for an accused to be convicted of a crime of murder in the

first degree even though the accused may not have been able to differentiate between right and wrong at the time of the commission of the offenses" (Brief of Petitioner at 8-9). Such a contention does not comport with the law within this State. Moreover, the petitioner did not, and is unable to, support such a contention with a citation of relevant authority.

The M'Naghten test of criminal responsibility is not constitutionally infirm. The question as to whether the M'Naghten Rule works as a deprivation of due process is not unique; the issue was addressed by this Court in *Leland* v. *Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1032 (1952). The Oregon law which was challenged in *Leland* required that a defendant prove insanity beyond a reasonable doubt. The Court held that placing the burden of proving insanity, beyond a reasonable doubt, upon the defendant was not a violation of due process. The Court further stated that:

> "The science of psychiatry has made tremendous strides since that test was laid down in M'Naghten's Case, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law."

Id., at 800-801. In *Phillips* v. *Hocker*, 473 F.2d 395 (9th Cir. 1973), the Ninth Circuit held that since *Leland* permitted Oregon to require that the defendant prove his insanity beyond a reasonable doubt, the Nevada statute which imposed upon a defendant the burden of proving insanity by a preponderance of the evidence would certainly not violate the due process clause. While it is true that the burden

of establishing the essential elements of the charge remains with the prosecution, the burden of establishing insanity as an affirmative defense may be placed upon the defendant.

> "Therefore, so long as the trial court charged the jury that it was the state's burden to prove beyond a reasonable doubt every element necessary to constitute the crime of first degree murder, there would be no constitutional violation of due process of law even though the appellant was required to maintain the burden on the issue of his insanity defense."

Hill v. *Lockhart*, 516 F.2d 910, 912 (8th Cir. 1975). The Eighth Circuit reaffirmed its position in *Duisen* v. *Wyrick*, 566 F.2d 616 (8th Cir. 1977), when it determined that placing the burden of proving insanity upon the defendant was not a violation of due process.

The United States Supreme Court gave *Leland* v. *Oregon*, supra, continuing viability in *Patterson* v. *New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). The Court, at 201-202, stated that:

> ". . . it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of Justice as rooted in the traditions ranked as fundamental.' "

The Court further stated that:

> ". . . although the State could go too far in shifting the burden of proof to a defendant in a criminal case, the Due Process Clause did not invalidate every in-

stance of burdening the defendant with proving an exculpatory fact.

The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."

Id., at 203, n. 9. An affirmative defense, such as insanity, constitutes an issue separate and distinct from the elements of the crime. The defendant is required to carry the burden of persuasion for an affirmative defense. Proof of the elements of a crime does not require the State to disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses.

"To recognize at all a mitigating circumstance does not require the State to prove its non-existence in each case in which the fact is put in issue, if in its judgent this would be too cumbersome, too expensive, and too inaccurate."

Id., at 209. The Court at 210, went on to hold that:

". . . the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. *Proof of the nonexistence of all affirmative defenses has never been constitutionally required;* and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here." (emphasis added)

In the case at bar, the jury was instructed upon the defense of insanity. Instruction No. 14 (O.R. 149) states in part that:

> "You are further instructed that the defendant has interposed as one of his defenses in this case the plea that he was temporarily insane at the time of the alleged commission of the crimes. That where this defense is sought to be established, the legal presumption of sanity must be overcome by evidence which is sufficient to raise *a reasonable doubt* of the Defendant's sanity at the time of the commission of the crime. *It does not require that the Defendant shall prove his insanity to the satisfaction of the minds of the jury by competent evidence beyond a reasonable doubt, or by a preponderance of the evidence. It is sufficient if he only introduces sufficient evidence to raise in your minds a reasonable doubt of his sanity.*" (emphasis added)

The presumption of sanity is overcome by a reasonable doubt. This is a light burden of proof compared to *Leland* which required proof beyond a reasonable doubt and *Phillips* which required a preponderance of the evidence. The Due Process Clause is not violated when a defendant is required to maintain the burden of raising a reasonable doubt as to his sanity because insanity is an affirmative defense. The M'Naghten Rule was not applied in a restrictive manner. The issue of voluntary intoxication was considered, however, it was not proven. The petitioner attempts to draw a distinction between a "pure" and a "restrictive" M'Naghten test (Brief of Petitioner at 13). Such a distinction is not recognized within this State.

The M'Naghten test is not constitutionally infirm. It was applied in a proper manner and in no way precluded the petitioner from having the jury consider any mitigating circumstances.

CONCLUSION

The Oklahoma Court of Criminal Appeals has acted consistently with the decisions of this Court and concluded that the rights of the petitioner were not violated. This case simply does not merit expenditure of the Court's scarce resources. Certiorari should be denied.

The State, having answered the Petitioner's assignment of error by both argument and citation of authority, respectfully requests this Honorable Court to deny the Petitioner's Writ of Certiorari.

Respectfully submitted,

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

ROBERT W. COLE
Assistant Attorney General

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Attorneys for Respondent

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APPENDIX

[Excerpt from Report of Trial Judge]

* * *

	Instructed	*Found*
f. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony.	[ ]	[ ]
g. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.	[X]	[ ]

6. List nonstatutory aggravating circumstances indicated by the evidence, if any.

   a. None

* * *

7. Was there evidence of mitigating circumstances?
   Yes [X] No [ ]

8. If so, which of the following mitigating circumstances was in evidence?

   a. The defendant has no significant history of prior criminal activity ..... [X]

   b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance ..... [X]

* * *

   f. The defendant acted under duress or under the domination of another person ..... [X]

   g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct to the requirements of law was impaired as a result of mental disease or intoxication ..... [X]

* * *